No. 4503.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT //

FRED T. MERRILL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

## Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

GEORGE NEUNER,
United States Attorney for the District of Oregon.

J. O. STEARNS, Jr.
Assistant United States Attorney for the District of Oregon.
Attorneys for Defendant in Error.

GEO. I SMITH PRINTING CO. PORTLAND, OREGON 5-7-25 40

No. 4503.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED T. MERRILL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

## Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

GEORGE NEUNER,
United States Attorney for the District of Oregon.

J. O. STEARNS, Jr.
Assistant United States Attorney for the District of Oregon.
Attorneys for Defendant in Error.

GEO. I SMITH PRINTING CO. PORTLAND, OREGON 5-7-25 40

## STATEMENT OF FACTS.

It seems essential that the facts in this case should be fairly and fully presented, particularly so as many of the errors claimed are predicated on what we believe to be a distortion of the proofs adduced upon trial.

In the Spring of 1923, conditions in the roadhouses adjacent to Portland were so notoriously bad that T. M. Hurlburt, Sheriff of Multnomah County, felt impelled to join forces with the Federal Government in order that the liquor law violations and evils growing out of the same in such houses might be curbed and the proprietors of the resorts brought to justice.

The Twelve Mile Roadhouse, or Plantation Inn, of which Fred T. Merrill, plaintiff in error, was (and still is, for that matter) proprietor, claimed the doubtful distinction of being the most flagrant offender of its sort against the prohibition laws.

Accordingly, one A. B. Gates, for thirty years a resident of Portland and at that time a Federal Prohibition Agent, joined forces with the Sheriff for the purpose of investigating Multnomah County roadhouses. It was considered desirable to have the

testimony of disinterested witnesses in addition to that of the investigating officers; and, accordingly, Mrs. Martha Randall, head of the Women's Protective Division of Portland, was consulted and, upon her recommendation, Miss Ruth Meade, an organist of this city, and Mrs. Violet Johnson, now in charge of the Women's Protective Division at Bend, Oregon, were induced to accompany Mr. Gates. Both Miss Meade and Mrs. Johnson had for some time been volunteer social workers, and they were chosen for the mission on a basis of character and intelligence. It was realized at the outset that any prosecution which might follow investigation of these roadhouses—particularly of the Merrill institution —would be bitterly contested.

**The Plantation Inn, or Twelve Mile Roadhouse, was the first one visited during the course of these investigations and is the only one with which we are concerned....** We wish to make that fact clear at the outset because during the trial of the Merrill case, the defense persistently attempted to confuse the issues by adducing testimony, on cross examination, as to the subsequent investigations of other roadhouses—some seven or eight in number.

At this point, also, may we emphasize the fact

that in accepting the mission required of them, Miss Meade and Mrs. Johnson volunteered their services without hope or expectation of pecuniary reward, as will appear from a reading of the testimony in the record, and the $50.00 each which was subsequently paid to them by the Sheriff was a gratuity pure and simple.

On the evening of May 10, 1923, Gates, accompanied by the two ladies, left Portland in a taxicab for Merrill's place, and arrived there at about 11:30 P. M. They remained at the house until about three o'clock the following morning. Contrary to the contention of the plaintiff in error and quite in accord with the findings of the jury, they had no liquor with them when they went out to the Plantation Inn. Almost immediately upon arriving at the Merrill roadhouse, they were served by the defendant himself over the bar with gin fizzes and whiskey. They were also served with several rounds of intoxicating liquor during the course of the dinner which followed. Neither Miss Meade nor Mrs. Johnson is addicted to the use of intoxicating liquor, but, in order that they might be able to testify as to what was served, they tasted of the drinks, which they then got rid of by pouring on the floor under the table and into the waste food and coffee.

A number of guests, both men and women, were in the house during the time Gates and his party were there, and dancing, singing and drinking liquor made up the night's entertainment. One man known as Smith became so intoxicated that he fell while on the dance floor and had to be assisted out of the room by a waiter. A young girl (name unknown, but said to be a theatrical performer from Spokane, Washington) was hoisted upon the bar where she sang and danced. This was in Merrill's presence. At the time of leaving, Gates and Mrs. Johnson purchased from Merrill two pint bottles of intoxicating liquor—one moonshine whiskey and the other synthetic gin—for which they paid him $5.00 each. Those bottles were in evidence at the trial.

On May 15, 1923, Deputy Sheriffs of Multnomah County, together with federal officers, armed with a search warrant and warrant of arrest for the plaintiff in error, went to Merrill's roadhouse, and, after an extended search, found in a paper sack hidden under three steps leading from the second story of the house in question onto a veranda which fronts upon the highway, approximately eleven bottles of whiskey, gin and cocktails. The bedroom

then used by Merrill is immediately adjacent to this veranda, the door from the bedroom opening into a hallway, which hallway in turn leads immediately to the veranda. The testimony indicated that the liquor and containers had been under the steps but a short time, as they were fresh and clean. As indicated above, Plantation Inn is equipped with a regulation old-fashioned bar, such as were in use in saloons and roadhouses in pre-prohibition days. Numerous empty gin and cocktail bottles of the kind and character of those found under the varanda steps were discovered back of the bar and in boxes scattered about the premises. Two cocktail bottles, one of them yet damp and smelling of the odor of the liquor it had contained, were found in Merrill's bedroom. A pint bottle, yet containing a small quantity of moonshine whiskey, was found on the back shelf of the bar.

One Nickell, employed as a waiter by Merrill shortly prior to the 10th of May, 1923, testified that while he was at the roadhouse in question he personally saw Fred T. Merrill, plaintiff in error, make several sales of intoxicating liquor, some of which was served as drinks over the bar, some of which was sold by the bottle and carried away by the purchasers.

## POINTS AND AUTHORITIES.

1. Where it does not appear from the record that the defendant was arrested on the information, it is not necessary that the same shall be supported by an affidavit showing personal knowledge of facts and stating probable cause.

Morgan vs. United States, 224 Fed. 82.
United States vs. McDonald, 293 Fed. 433.
Jordan vs. United States, 299 Fed. 298.

2. It is well settled that a trial and conviction may be had on an information which is wholly without verification.

Same authorities.

3. In a prosecution for unlawful possession of intoxicating liquor under the National Prohibition Act, the burden is upon the accused to show that the liquor made the basis of the prosecution was, in fact, lawfully possessed, and an information which charges that the defendant unlawfully possessed intoxicating liquor, fit for beverage purposes, etc., sufficiently charges the offense.

Anzich vs. United States, 285 Fed. 871.
Payne vs. United States, 2 Fed. (2d) 855.
Feinberg vs. United States, 2 Fed. (2d) 955.
Linden vs. United States, 2 Fed. (2d) 817.

4. A single sale of intoxicating liquor may be sufficient to warrant a jury in returning a verdict of guilty against one charged with maintenance of a nuisance under the National Prohibition Act.

Fassolla vs. United States, 285 Fed. 378.
Barker vs. United States, 288 Fed. 249.
Marshallo vs. United States, 298 Fed. 74.
Singleton vs. United States, 290 Fed. 130.
Stoko vs. United States, 1 Fed. (2d) 612.

5. In a prosecution for maintaining a nuisance under the National Prohibition Act, general reputation as to the character of the place where such nuisance is maintained is admissible to prove the guilt of the defendant.

Ryan, et al, vs. United States, 285 Fed. 734.
Anzine vs. United States, 260 Fed. 827.

6. The refusal of the trial court to permit the defense to cross examine a witness for the prosecution upon matters wholly irrelevant to the issue under inquiry and not fairly calculated to test the credibility of the witness does not constitute error.

West vs. United States, 2 Fed. (2) Page 201.
Wigmore on Evidence, Vol. 2 (2nd Ed.)
Section 878.

7. Evidence of reputation to affect the credibility of a witness ordinarily and generally should be based upon what is said of the witness by the members of the community in which he lives and acts—that is to say, the place or community on which the reputation is predicated ordinarilly must be in the neighborhood where such witness has resided.

Wigmore on Evidence, Vol. 3, Page 365, Section 1615.

Williams vs. United States, 168 U. S., 382-397.

8. Where the evidence shows without conflict that the government witness did no more than offer to buy liquor, thus affording the plaintiff in error an opportunity to violate the law, there is no entrapment.

Jordan vs. United States, 2 Fed. (2) 598.

Murphy vs. United States, 2 Fed. (2) 599.

Johnstone vs. United States, 1 Fed. (2) 298.

9. A conviction will not be set aside because of refusal to give instructions in the language requested by the accused's counsel to the same effect as instructions given by the Court.

Stubbs vs. United States, 2 Fed. (2) 468.

## ARGUMENT.

For the convenience of the Court, we shall take up and discuss the assignments of error relied upon in the order in which they are argued by counsel for Mr. Merrill.

1. The first assignment relied upon is that the information is not supported by affidavit showing probable cause, and is therefore insufficient.

It is a rule of law that where it does not appear from the record that the defendant was arrested on the information, it is not necessary that the same shall be supported by an affidavit showing personal knowledge of facts and stating probable cause. Indeed, in such event, it need not even be verified.

No objection was interposed to the sufficiency of the information prior to trial, and by virtue of that fact, the plaintiff in error would, in any event, have waived his right to challenge the sufficiency of the verification.

It is well settled that a trial and conviction may be had on an information which is wholly without verification.

We therefore submit that assignment of error number one is completely devoid of merit.

Morgan vs. United States, 224 Fed. 82.
United States vs. McDonald, 293 Fed. 433.
Jordan vs. United States, 299 Fed. 298.

The case last cited was decided in this Court in an opinion rendered by Judge Gilbert.

2. The second assignment questions the sufficiency of Count One, charging possession, on the ground that the same does not state facts sufficient to constitute an offense. Upon that point it is the principal contention of counsel for Merrill that mere possession of intoxicating liquor does not constitute an offense under the National Prohibition Law, and that it is incumbent upon the prosecution to negative all exceptions contained in the law relative to possession.

It is necessary only to advert briefly to recent authorities in point. In the case of Panzich vs. United States, reported in 285 Fed. 871 (9th Circuit), Judge Hunt, speaking for the Court, has stated in certain terms that in a prosecution for unlawful possession of intoxicating liquor under the National Prohibition Act, the burden is upon the accused to show that the liquor made the basis of the prosecution was, in fact, lawfully possessed.

An information which charges that the defendant unlawfully possessed intoxicating liquor, fit for beverage purposes, etc., sufficiently charges the offense.

> Pane vs. United States, 2 Fed. (2nd Ed.) 855.
> Feinberg vs. United States, 2 Fed. (2nd Ed.) 955, decided by District Judge Munger, is also in point and cites numerous authorities which support the sufficiency of the allegations of Count One of the information.
>
> See also Linden vs. United States, 2 Fed. (2nd Ed.) 817.

3. Assignment of Error No. 3 is similar in purport to the one just discussed, in that it raises the question as to the sufficiency of Count Three of the information, charging the defendant with the maintenance of a nuisance under the law in question. In support of this assignment of error, counsel contend that a single sale of intoxicating liquor is not sufficient upon which to predicate a verdict of guilty respecting that charge.

This contention seems to question the sufficiency of the proof rather than the sufficiency of the charges set out in Count Three.

That a single sale of intoxicating liquor may be sufficient to warrant a jury in returning a verdict of guilty against one charged with maintenance of a nuisance under the National Prohibition Act has been too frequently decided in the affirmative to require comment. The following cases are squarely in point and appear to conclusively refute the contention of plaintiff in error respecting the nuisance count.

Fassolla vs. United States, 285 Fed. 378 (9th Circuit case decided in an opinion by Judge Gilbert).

Barker vs. United States, 288 Fed. 249.

Marshallo vs. United States, 298 Fed. 74.

Singleton vs. United States, 290 Fed. 130.

Stoecko vs. United States, 1 Fed. (2nd Ed.) 612.

4. **Alleged error in admitting testimony of M. O. Nelson as to general reputation of Plantation Inn.** The fourth assignment of error has relation to the testimony of M. O. Nelson respecting the general reputation of Plantation Inn, the house conducted by Fred. T. Merrill, plaintiff in error. It is charged that the Court erred in permitting Mr. Nelson to testify as to the general reputation of the house as

being a place where intoxicating liquors were commonly kept, sold and dispensed.

Counsel for Merrill rely principally on the case of United States vs. Jourdine, Fed. Cases 15, 499, to support this contention of error.

It is admitted that authorities do not universally agree respecting the admissability of general reputation by the prosecution in proof of an information or indictment charging the maintenance of a nuisance; but we have no hesitance in asserting that the weight of authority is in favor of the admission of such evidence.

The Circuit Court of Appeals (5th Circuit), in the case of Ryan, et al. vs. United States, 285 Fed. 734 (decided December 19, 1922), has decided that it is proper for the Government, in the prosecution of a charge of maintaining a common nuisance under the National Prohibition Law, to prove that the reputation of the premises maintained by the defendants was bad.

The opinion of the Court in the case of Anzine vs. United States, 260 Fed. 827, we consider to be decisive of the question. Judge Gilbert, who wrote the opinion, after considering the authorities upon

both sides of the question, concluded that in the prosecution for the keeping of a house of ill fame, common reputation is admissable against the defendant. The reasons annuciated in support of that ruling are, we have no doubt, equally applicable to the situation here, and we deem it unnecessary to go further into that phase of the case.

5. **Alleged error in admitting testimony of W. H. Nickell as to prior sales.** The error claimed with respect to the admission of the testimony of W. H. Nickell as to prior sales is, we believe, equally without merit.

With respect to this proposition, the case of M'Donough, 299 Fed. 30-40, appears to be upon all fours with the Merrill case. It was there claimed that the trial court erred in admitting, in proof of a nuisance charge, evidence of prior distinct sales of intoxicating liquor. Upon this point we quote from the opinion of the Court as stated by Judge Morrow:

> "There was also evidence tending to show sales of drinks to others served by Rice while the parties were negotiating for the Perrucci purchase; also testimony tending to prove the

sale of whiskey by Rice on the 16th of March, one week prior, and on two other occasions—once four and one-half months before and again about two and one-half or three months before. There was evidence tending to prove that M'Donough became suspicious of the sale of the whiskey to Perrucci and closed the saloon a few days after the sale. All this testimony was relevant to the charge of maintaining a common nuisance and admissable upon that issue, and separate and distinct from the evidence adduced to prove the sale of five gallons of whiskey on March 23, 1923, not obtained by seizure, which was admitted by the defendant Rice, and was all separate and distinct from the subsequent search and seizure of liquor at 162 11th on April 25, 1923."

Many other authorities could be cited in point; but we think this sufficient for the purpose. Nickell's testimony concerning prior sales was admitted as pertinent to the charge of maintaining a nuisance, and, we submit, properly so.

6. **Alleged error in refusing to admit evidence on behalf of defendant as to conduct of business.**

Assignment No. 6, we think, need hardly be noticed. The defense attempted to elicit from Russell Underwood, a witness for Merrill, testimony respecting the conduct of the house in question by the defendant subsequent to the time of his arrest on the charge in question, which was on May 15, 1923. Clearly, this would be self-serving, and equally clearly, we think, the ruling excluding such testimony was proper.

It is to be noted that in the closing paragraph upon this subject (Page 25, Brief) counsel again make reference to the testimony of Nickell and there assert that the sales testified to by him were made **months** before the date charged in the information. This is perhaps inadvertent; but we deem it proper to call the Court's attention to the fact that the sales testified to by Nickell as having been made by Merrill occurred only some three weeks prior to the date of the sales charged in the information.

7-8. **Alleged error in admitting record of prior conviction of defendant.** We now come to a consideration of assignments of error Nos. 7 and 8. Since they pertain to the same subject matter, we shall not undertake to discuss them separately, but

rather as a single issue.

Upon cross-examination, plaintiff in error was asked whether or not he had ever been convicted of a crime. To that question he replied, "No sir." Thereafter, he was asked specifically if it were not a fact that on the 6th day of September, 1910, he entered a plea of guilty to an indictment charging the crime of selling liquor in quantities less than a gallon at the Twelve Mile Roadhouse. Again the answer was, "No sir." The Court then permitted the prosecution to introduce into evidence the record of the Circuit Court of the State of Oregon for Multnomah County, showing that Merrill was, in fact, convicted, upon his plea of guilty, of the offense above indicated, and that he was thereupon fined $250.

Merrill takes exception to the admission of that evidence upon the ground that it was not competent to affect his credibility. In order to determine whether or not this position is well taken, it becomes pertinent to examine the statutes under which he was thus convicted.

Section 4938 (Chapter 2, Title XXXVI) L. O. L., provides, among other things, that no person shall be

permitted to sell spiritous, malt or vinous liquors, etc. in less quantities than one gallon without having first obtained a license from the County Court of the proper county for that purpose.

Section 4940 (same chapter and title) L. O. L. fixes the amount of the license for one engaged in the sale of such liquors in quantities less than the amount above specified at $400 per annum.

Sections 4945 and 4946 (Chapter 2, Title XXXVI) L. O. L. imposes upon prosecuting attorneys, sheriffs, constables and justices of the peace the duty of making complaint of all offenses arising under the act to the Grand Jury at the next term of the Circuit Court of the county in which the offense may have been committed after such violations, and imposes upon the County Clerk the duty of delivering to the Grand Jury a correct list of all persons holding licenses under the provisions of the act in question within the county.

Section 4947 (Same Chapter and Title) L. O. L. makes it a misdemeanor to violate any of the provisions of the act and provides for a violation thereof a fine of not less than $200 and not more than $400.

Section 4948 (Chapter 2, Title XXXVI) L. O. L. reads as follows:

> "It shall be the duty of the Grand Jury, at each and every term of the Circuit Court in any county in this state to make a strict inquiry and return bills of indictment against every person violating any of the provisions of this act."

From the foregoing it becomes apparent that the act creating the offense for a violation of which Merrill was convicted in 1910 was a revenue act of major importance to the State of Oregon. The weight and significance which the state then attached to the act and to the source of revenue thereby created is apparent upon a reading of the sections which impose upon public officials and grand juries the duty of seeing that the law should be strictly observed.

The act is in many of its aspects, very similar to the National Prohibition Law. Both concern the selling of intoxicating liquors. Both are revenue acts. Both are misdemeanors. The punishments following a violation of the two laws under consideration differ somewhat in degree, but not in kind.

If moral obloquy of the sort and degree tending to affect the credibility of a witness would follow upon a violation of the National Prohibition Law, the same would certainly be equally true with respect to a violation of the Oregon Liquor License Laws. If it is an offense to perpetrate a fraud upon the Government by withholding revenues justly due, would it not also be a fraud upon the State to do likewise with respect to a state revenue law? So far as moral delinquency is concerned, it is just as great an offense to cheat a blind Chinaman out of a nickel as it is to defraud the corner grocer out of five dollars.

Tiemeyer vs. United States, 280 Fed. 322.
Parks, et al, vs. United States, 297 Fed. 834.
Fields vs. United States, 221 Fed. 242.

are, we think cases in point. The Fields case we deem particularly applicable in that it sets out the reason for holding that evidence of prior similar offenses is admissable on cross-examination as affecting the credibility of a defendant who undertakes to testify in his own behalf. Judge Knapp, speaking for the Court in the Fields case, points out that the defendant, in violating the federal revenue laws, was guilty of a fraud upon the Government, and adds:

> "We are not prepared to endorse the proposition that no reflection is cast upon the character of a witness by proof that he has been convicted of cheating the Government."

By his plea of guilty to the indictment returned against him by the State Grand Jury, Merrill stands convicted of precisely the same sort of offense in that he cheated and defrauded the state government by failing to take out a license covering the sale of spiritous liquors in less quantity than one gallon. The fact that a considerable period of time had elapsed between the conviction under the State Liquor Laws and the trial for violation of the National Prohibition Law, certainly would not relieve Merrill of the stigma which attached to the first offense, nor detract anything from the weight of the same as affecting his credibility.

It is true that the admission of the record of prior conviction was a mere incident in the trial and might perhaps as well have been omitted so far as the result of the prosecution was concerned. Nevertheless, we submit that it was competent and proper as bearing in some degree upon the credibility of the defendant.

Plaintiff in error further contends that, having permitted the cross-examination of Merrill touching the prior conviction, he should have been permitted to explain the same and that it was error to deny him that privilege. Had Merrill, when questioned, admitted the former conviction, there might have been, under some authorities, a color of reason in this contention; but Merrill denied the conviction. The matter should, we submit, have stopped where his answer put it. Such, however, was not the case, for, as will appear from the reading of such of the testimony of Merrill as is set out in the record, despite the ruling of the Court, Merrill did undertake to explain away the conviction, as witness the following on cross-examination:

> "I saw this and read it at the last trial. I never was arrested in my life. I never sold a drink in my life, and my bar-tender and waiter sold a glass of port wine, a glass of beer, at half past one o'clock at night, and I was sick in bed at the time, and this trial—it never came to trial."

And again, on re-direct examination.

"Q. (By Mr. Goldstein) Now, counsel asked you if you had been convicted of crime and you denied

it, and then introduced in evidence Government's Exhibit 14, in which George Stewart and Fred Horn are joined with you to the effect that in 1910 you were charged with the offense of selling liquor in quantities of less than one gallon without a license. Who were George Stewart and Fred Horn?"

A. They was a waiter and the other man that worked there for me.

Q. Were you present in your establishment on that day in 1910?

A. I was not. I was sick with a broken collar bone.

Q. Why did you deny that?

A. (over objection by Mr. Stearns) I was never in court.

Q. Explain that. Why did you deny that?

A. Because I never was in court.

Q. What are the facts concerning that?

COURT: I don't think you can go into that case.

Q. Had you ever appeared in court?

A. No, sir."

From what has been said it will be observed that

the witness did undertake to exploit to the jury his version of the incident in question, and his testimony in that regard was permitted to stand. The jury had the benefit of it for whatever it may have been worth, and it is not easy to see how the defendant could have any just cause for complaint on that score.

9. **Alleged error touching cross-examination of M. O. Nelson.** In answer to the contention that the Court erred in restricting the cross-examination of M. O. Nelson, a witness for the Government, we have only to refer to the record. An examination of Mr. Nelson's testimony, of the objections taken and the rulings of the Court, as they are set down, will suffice.

At this point it may not be amiss to say that the trial of this case extended over a period of nine days, and that the transcript of testimony covered some 550 pages. The Appellate Court will not have the advantage (if such it might be termed) of the entire record.

Woven into the brief of plaintiff in error is a veiled but unmistakable undertone of criticism of the trial court, carrying with it an evident aspersion upon the fairness of the judge who conducted the

case. Innuendo is a dangerous and often-times very difficult thing to meet. Suffice it to say, that greater patience and fairness on the part of the Court, under equally trying circumstances, could not have been expected nor given.

9-10. **Alleged error touching cross-examination of A. B. Gates and Miss Ruth Meade.** We now come to a consideration of assignments No. 9 to 24 inclusive, having to do with alleged error in restricting the cross-examination of A. B. Gates and Miss Ruth Meade, witnesses for the prosecution. It is, of course, fundamental in the law of evidence that the defense, in a criminal prosecution has the right to a full cross-examination of witnesses for the prosecution touching their examination in chief, and within proper bounds of any collateral matters, reasonably calculated to test credibility, and that undue restriction of that right, to the material prejudice of the defendant, constitutes reversible error. It is, we believe, equally fundamental in the law that, subject to the right above annuciated, it is not only the privilege, but the positive duty of the trial court to hold such cross-examination within reasonable bounds, in order that unnecessary confusion of issues may not ensue.

Under the caption "Distinction Between Cross-Examination and Extrinsic Testimony," Professor Wigmore has this to say anent the subject:

> "Two things must be kept in mind about such rules. (1) The question of **Relevancy** is not touched by them. The restriction is based wholly on some doctrine of Auxiliary Policy. It prescribes that such-and-such evidence **if relevant** is to come only from specific sources. Its relevancy is still open to question . . . . Thus, there is **no virtue in the cross-examination as such** with reference to the admissibility of the alleged act. The notion is not that because we are cross-examining, therefore we may get admission for this or that fact; for the fact cannot go in if it is not relevant . . . ."
>
> Wigmore on Evidence, Vol. 2 (2nd Ed.) Section 878.

It therefore becomes of prime importance here to determine the kind and character of the subject matter sought to be probed into by the defense in its cross-examination of these witnesses and the relevancy and materiality of such matter, if any, to the charge upon which the defendant was being

tried, ir order to test the propriety of the rulings claimed as error.

Since counsel for plaintiff in error have undertaken, in their brief, to brand Mr. Gates, Miss Meade and Mrs. Johnson as "informers," a term synonomous with the approbrious sobriquet "stool pigeon," both odious as applying to a class of persons generally associated with crime and the underworld, we think it not inept again to remind the Court at this point that none of the three persons named belonged to the type adverted to and with which counsel persistently, throughout the trial of the case sought, and now before this Court, seeks to associate them.

Mr. Gates was an officer of many years experience, of high standing and unimpeachable character. Mrs. Johnson and Miss Meade were and are splendid and courageous women, and in doing what they did to assist the officer were actuated by the purest of motives. It is true that, in order to gain admittance to Merrill's roadhouse and to procure evidence of law violations going forward there, they did feign a certain degree of intoxication. Had they not done so, Merrill would never have been brought to justice, for Merrill selected his patronage with a nice degree of discrimination, and would have been quick

to suspect any persons entering his institution who did not carry with them an atmosphere of conviviality in the sense that that term would apply to the situation in hand.

It will be noted, upon a reading of Merrill's brief, that his counsel have taken the liberty of extracting excerpts from the testimony of Mr. Gates and Miss Meade and of commenting upon such excerpts, not in the natural order in which the testimony was given, but in such fashion as to satisfy the ends which counsel had in mind, namely: to make it appear, by thus twisting and distorting the facts, that the Court had committed error. We particularly invite the Court's attention to the paragraph at the foot of page 35 and at the top of page 36 of the brief of plaintiff in error, wherein counsel assert that immediately **preceding** and following the visit to defendant's premises, Gates had visited some seven other alleged roadhouses. Whether intentional or unintentional, this statement contains a vicious misrepresentation of fact. We again repeat what we have called attention to in our opening statement, namely: (and we wish to emphasize this because it is important) that the Merrill roadhouse was the first one visited by Mr. Gates, Miss Meade

and Mrs. Johnson or either of them. It was, in fact, the only roadhouse visited by these people on the night of the 10th and morning of the 11th of May, 1923. A reading of the record will make that fact very apparent.

It is true that Underwood, a taxi driver, who drove Mr. Gates and his party to the Plantation Inn, was a witness for the defendant, and that he claimed that Gates had liquor with him when he entered the taxicab at Portland, and that he (Gates) consumed the greater part of a flask of liquor on the way out. This was flatly contradicted by Mr. Gates, Miss Meade and Mrs. Johnson. Under the pretext then of lending color to the obviously false and utterly discredited testimony of the witness Underwood, who at the time of trial was in the employ of Merrill, it was sought to elicit upon cross-examination, from was sought to elicit, upon cross-examination, from Mrs. Gates and Miss Meade, statements that upon a subsequent visit to another roadhouse, Gates had taken liquor upon the premises. This was a most transparent attempt upon the part of the defense to confuse the issues by introducing evidence of subsequent and wholly disconnected matters into the trial of the man Merrill.

Of the eight roadhouses raided by the authorities at about the same time, but two were prosecuted in the Federal Court; the others went to the State Courts.

In the course of cross-examination, counsel repeatedly attempted, by cunningly framed questions, to put into the mouths of Government witnesses statements that prior to going out to the Merrill roadhouse they had received from the Sheriff general instructions as to what they should do in the course of investigating the various places under suspicion. In order to make it appear that such general instructions actually were given, counsel have cited in their brief certain excerpts from the testimony. (See especially Page 36, Brief of Plaintiff in Error.)

A reading of the testimony in the record will disabuse the inquiring mind as to any erroneous idea which might arise from a perusal of such excerpts. For instance, on page 105, Transcript of Record, in the cross-examination of Miss Meade the following questions and answers appear:

"Q. I will ask you whether or not it is not a fact that you received definite instructions as to all these roadhouses prior to going out to Merrill's place?

A. No, not about all of them.

Q. About how many of them?

A. I don't know.

Mr. Stearns: If Your Honor please, I don't see that that is in this case particularly.

A. May I say this? I wish to say this—that those cases were not all discussed at any one certain time or any certain place.

Court: You have talked about them several times with the officers?

A. Yes, sir.

Court: As you went from place to place you talked about them?

A. Yes. There was no definite outline given us.

Q. (by Mr. Goldstein) Was a discussion had as to any particular number of roadhouses prior to going out to Mr. Merrill's place?

A. No, there was not."

And the testimony of Mr. Gates and Mrs. Johnson, when read as given, will bear this out.

Apparently in an effort to lend color to counsel's misstatement that Gates had investigated some of

these roadhouses prior to the visit to the Merrill roadhouse, they set out, near the top of page 41 of their brief, the following question:

> "Now, I will ask you, Mr. Gates, if at any time prior to May 10, in making your investigations, you had occasion to use liquor as a means of inducing violations of law."

This question was clearly objectionable for two reasons: First, it was general and indefinite in tenor, relating to no particular time or place; and, Second, it contained the very obvious vice of an assumption that Gates had induced violations of law, which was, of course, untrue. The question did not in any way relate to the matter under investigation, not to the roadhouse situation as it existed in and about Portland on the 10th of May, 1923. The full text of the testimony of Gates adduced upon cross-examination is not before the Court; but we think there is sufficient in the record to disclose that no error was committed by the Court in limiting the defense in its inquiry respecting what may or may not have happened upon subsequent visits by the same persons to other roadhouses.

We also invite the special attention of the Court

to the testimony of Miss Ruth Meade, both as to the excerpts contained in brief of plaintiff in error and as to the fuller text set out in the transcript of record. It is to be noted that counsel conclude their quotations from the testimony of Miss Meade (at the top of page 47 of their brief) as follows:

"Court: That is as far as you may go.

Mr. Goldstein: May I take an exception?"

thereby leaving the impression that they were not permitted the privilege of requiring the witness to answer the question as propounded. This is grossly misleading and deliberately untrue. If the Court will first read the supplemental transcript of plaintiff in error, and then turn to page 102, Transcript of Record, the sham will at once become apparent. This is the matter that we advert to and which connects immediately with the matter last quoted above.

"Court: You are asking that question?

Q. (by Mr. Goldstein) Now, I will ask you, Miss Meade, whether or not you gave that testimony as we have read it to you at that time and under those circumstances.

A. **If I gave that testimony I was mistaken in that date that you asked me when I was in Sheriff Hurlburt's office.**

Q. Will you please answer the question. Did you give the testimony as I read it to you?

A. I must have if you have it written.

Court: But you say now you were mistaken.

A. **If I gave that testimony I was mistaken in the date asked me that I was in the office at that time."**

Counsel's cleverness in confusing and misleading the witnesses on cross-examination is only exceeded by his ability to make the record seem to say what is not the truth. For instance, witness the following (Page 47, Brief of Plaintiff in error).

> "We feel confident that no legal authority can be submitted by the Government that will justify the Court in restricting our right to impeach a hostile witness upon a most material inquiry, to-wit: **whether she had not testified on a previous occasion that, in accordance with their general instructions from the Sheriff, not only was liquor used by them in investigating these roadhouses, but that liquor was actually given to the taxi driver, just exactly as was testified to by the taxi driver Underwood in this case."**

A more deliberate perversion of the truth could

not well be imagined. Counsel know, and the record will show, that Miss Meade never at any time, either before or following the trial of Merrill, testified that liquor was actually given to the taxi driver just exactly as testified to by the taxi driver Underwood in this case, or at all.

Or, perhaps counsel do not mean what they say. Perhaps they mean simply to say that at a prior trial in the State Court Miss Meade had testified that, when necessary, they were to use liquor in the course of their investigations or roadhouses subsequent to the visit to Merrill's place on May 10th.

In summarizing the testimony of Mr. Gates, Miss Meade and Mrs. Johnson, counsel archly conclude that the trio were employed by the Sheriff to investigate eight roadhouses about the city; that the employment was a continuous affair, covering two or three successive days; that Miss Meade and Mrs. Johnson were each paid $50 for their services; that the party was reimbursed for expenses incurred, and that the money thus "exacted" from the public treasury was utilized in "imbibing intoxicating drink, dining on delectable viands and paying taxi fares," all of which has a most familiar ring, for we believe that we heard it twice thundered into the

ears of the jury during the two trials of this case in the Federal Court.

It is unnecessary to offer comment upon the obvious purpose of counsel in thus garnishing their brief. None of these parties can truthfully be said to have been in the employ of Sheriff Hurlburt. Mr. Gates was an independent federal officer, employed by the Government and paid by the Government, and taking orders from no one but his superiors in the Government Service. Miss Meade and Mrs. Johnson, were as we have already seen, volunteer social workers, who consented to accompany Mr. Gates, not as counsel would have the Court believe, for pecuniary reward, but out of the purest and loftiest of motives, namely: a desire to assist in abating the abominable cesspools of vice, which were operating upon the fringes of the city and which not only presented flagrant examples of disregard of law and decency, but were the rendevouz of denizens of the tenderloin, and their convenient and ready tools in the debauching of young girlhood.

We have no quarrel with the authorities cited by counsel touching the latitude to be allowed the defense upon cross-examination; but those authorities, as we read them, do not at all apply to the situation

here. What we mean may be best illustrated, perhaps, by adverting to the case of DiSalvo vs. United States, 2 Fed. (2nd Ed.) 222, cited and relied upon by counsel, wherein the Court said:

> "Where one of the defenses was entrapment, questions asked in cross-examination of a Government witness who was one of the parties to the alleged entrapment as to what transpired between them **prior thereto** were competent and their exclusion was error."

That unquestionably would be true; as applied to the facts in that case; but such is not the situation in the case before the Court. As we have before stated, the Merrill roadhouse was the first place of that character to be investigated by the government agent and his companions and was in no way connected with the subsequent investigations of other similar institutions.

We respectfully submit that the rulings of the Court upon the cross-examination, made the basis of assignments nine to twenty-four inclusive, were proper and devoid of error.

12. **Alleged Error in Restricting Cross-Examination of Martha Randall.** (Assignments 25 and 26.)

The error claimed with respect to the cross-examination of Martha Randall is of a piece with that which we have just considered.. Both in the direct examination of witnesses for the defendant and in cross-examination of witnesses for the Government, counsel for Merrill attempted to cast discredit upon Miss Meade and Mrs. Johnson by trying to make it appear that they were paid informers and common strumpets. Not only the questions thus put, but the manner and tone of voice of counsel in asking them, were artfully calculated to the ends which counsel sought to accomplish, namely, to shame and discredit Miss Meade and Mrs. Johnson in the eyes of the jury. The cross-examination of Miss Martha Randall, who recommended Miss Meade and Mrs. Johnson, was bent to the same vicious purpose. Therefore, the question adduced upon redirect examination as to whether Miss Randall knew the ladies in question to be reliable, responsible girls. The re-cross-examination which then followed was not at all calculated to test the credibility of the witness, but was simply a further attempt by counsel to cast odium upon Miss Meade and Mrs. Johnson.

13. Alleged Error in Restricting Cross-Examination of P. V. Rexford. (Assignment 29.)

This assignment of error seems to be so utterly devoid of merit as to require no comment, and we, therefore, pass it by.

14. Alleged Error in Restricting Cross-Examination of T. M. Hurlburt. (Assignments 38 and 39.)

What has just been said respecting the ruling of the Court as to the testimony of P. V. Rexford is equally true, we submit, respecting the rulings of the Court upon the cross-examination of Sheriff T. M. Hurlburt. A mere reading of the testimony will, we believe, conclusively refute the error claimed by the defendant upon this point.

As to all of the errors predicated upon limitation of cross-examination, we think that the reasoning of the Court in the recent case of West vs. United States, 2 Fed. (2nd), Page 210, should apply. In that case the plaintiff in error, with one McKay, was indicted for selling intoxicating liquor contrary to the provisions of the National Prohibition Act. Error was claimed upon the rulings of the Court in limiting the defendant's cross-examination of Government witnesses. In disposing of that point, Judge Ross, speaking for the Court, said:

"The first of such exceptions was taken to the ruling of the Court in refusing to permit the Government witness Simmons, who was a prohibition agent and who testified in substance that, besides visiting the defendant West's place of business, he had visited eight or ten other such places, to give a list of the various persons he had met at those places; plaintiff in error claiming that such testimony Would go 'to the credibility fo the witness . . .' We can see no merit whatever in any of the exceptions."

15. Alleged Error in Refusing to permit E. W. Aylsworth to Explain his Testimony as to the General Reputation of Plantation Inn. (Assignment 36.)

We cannot persuade ourselves that Assignment of Error No. 36, having to do with the testimony of E. W. Aylsworth, is worthy of serious consideration. Mr. Aylsworth perfectly understood the question propounded to him touching the reputation of the Plantation Inn, as will appear from a reading of the questions propounded and the answers given, and truthfully testified that that reputation was bad. Counsel's hectic attempts to procure the witness to alter his testimony were so transparently impro-

per that we are led to wonder at the optimism which now prompts this claim of error.

16. Alleged Error in Refusing to Admit Evidence as to the General Reputation of A. B. Gates for Truth and Veracity. (Assignment 32.)

> "Gates, the **informant,** who was responsible for this prosecution, was, of course, the principal witness against the defendant."

say counsel for Merrill as an opening shot in argument on the above point. Mr. Gates, the federal prohibition officer, was not responsible for this prosecution and was not the principal witness against the defendant. The defendant himself, by reason of his own flagrant disregard of law and decency, was responsible for this prosecution, and the testimony of the two ladies who accompanied Mr. Gates was in every respect as valuable, and in some respects more so, than the testimony of that officer.

It is singularly and indubitably true that at every turn of the case, from its inception until the verdict was in, counsel for Merrill sought to substitute Mr. Gates as the defendant in the case; and they are still at it.

It is undisputed that for many years Mr. Gates had made his home at Portland, Oregon, and it is

equally true that his neighbors, friends and associates for the most part reside in that city. For years Mr. Gates has been known at Portland as a law enforcement officer and, as the testimony shows, he has served there, prior to his appointment as general federal prohibition agent, in the capacity of deputy sheriff for Multnomah County. Had the reputation of Mr. Gates been subject to impeachment, in all fairness, witnesses for that purpose should have been called from among Mr. Gates' acquaintances and associates at Portland.

Therefore, when the defense produced as a character witness against Mr. Gates the disgruntled Sheriff from Medford, into whose county Mr. Gates had been sent some two and one-half years before for the purpose of checking liquor law violations which were going forward undisturbed under the Sheriff's nose, the Government interposed an objection which was sustained by the Court.

If we understand the law of reputation aright, the general rule relative thereto is that the impeaching witnesses must be able to testify to such reputation in the neighborhood where the witness has resided. In "Wigmore on Evidence," Section 1615, Page 365, Vol. 3, we find the rule expressed thus:

"**Reputation must be in the neighborhood of residence.** That discussion and comparison which contribute to the complete estimate and lead to the general concensus must, in the beginning, obtain its data from the experience of those who have had direct contact with the person in question, and it is these data of personal observation which are indispensable as a foundation of the final reputation. Such experience of observed instances is to be found only among those with whom the person ordinarily associates—that is, among the members of the community in which he lives and acts: Citing 1887, Brace, J., in Waddingham vs. Hewett, 92 Mo. 533; 5 S. W. 27. .(The witness to reputation) must be able to state what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant—not by those among or with whom he may have sorjourned for a brief period and who have had neither time nor opportunity to test his conduct, acts or declarations or to form a correct estimate of either. A man's character is to be judged by the general tenor and current of his live and not by a mere episode in it.' Accordingly, it is com-

monly said that the place or community on which the reputation is predicated must be the 'neighborhood' where he has 'resided.' The phrasings and definitions of this community and time of sojourning vary considerably; but nothing should turn upon precise words; and the general idea may be with sufficient correctness phrased in various forms."

Mr. Justice Harlan, speaking for the Supreme Court of the United States, in the case of Williams vs. United States, 168 U. S. 387-397, has stated the general rule in the following language:

"Assuming . . . that the accused introduced evidence of his general reputation for integrity, it is clear that evidence, on behalf of the prosecution, that among a limited number of people employed in a particular public building his character was bad, was inadmissible. The prosecution should have been restricted to such proof touching the character of the accused as indicated his **general reputation in the community in which he resided,** as distinguished from his reputation among a few people in a particular building." (The underscoring is ours.)

Of course, we do not claim that the facts in the Williams case are similar to those in the case at bar; yet, we do submit that the general rule there laid down, limiting proof of general reputation to the community in which the witness reside, is correct. We further contend that under the facts in the instant case, there was no reason for a depurture from the general rule as above expressed.

Touching this phase of the subject, (page 66 of their brief), counsel complain that they were not permitted to develop by the witness Carroll what Mr. Gates was doing while in Medford. Upon a reading of the testimony of Mr. Gates adduced on cross-examination, it will be observed that he already had testified as to his purpose in being at that place covering the short period adverted to. That testimony stood undisputed, and there was no attempt to impeach him upon that score.

Again, on page 68, Brief of Plaintiff in Error, counsel naively remark that it is quite evident that Mr. Gates never stayed in Portland long enough to acquire a reputation in that city.

Why "quite evident?" Where is the testimony to bear out that statement? It is a mere naked assumption, wholly unjustified by the facts.

The facts disclosed in the cases cited by plaintiff in error to sustain their contention on this point bear no resemblance to those in the case at bar. In the Cushenberry case, 157 Mo. 168, relied upon by the defendant, the man whose reputation was under attack was **"a nomad of such malodorous reputation** that soon after his arrival in Chilicothe he was pointed out **as a house-breaker.** If the reputation of such a one could not be impeached in the locality **where he last lingered,** the result would be he could not be impeached at all . . . ."

Mr. Gates was neither a nomad nor a house-breaker. He was a reputable citizen and an honest, efficient and fearless officer, with a home and family and a fixed habitation.

In the case of Brown vs. Perez, 89 Tex. 282, cited and relied upon by the defendant, the Court states certain exceptions to the general rule that evidence tending to impeach the reputation of a witness for truth and veracity shall have relation to the neighborhood in which such witness resides, and concludes that no definite rule can be stated which will apply to all cases. The Court in the instant case had heard the testimony of Mr. Gates and other witnesses and was, we submit, in a position to be ad-

vised as to whether, under all of the circumstances of the case, it were expedient and proper to admit in evidence the testimony sought to be elicited from Carroll. In the exercise of sound discretion and in pursuance to the general rule of law applicable to the situation, the Court refused to admit such testimony. This did not deny the defendant the right to call other impeaching witnesses from among Mr. Gates' neighbors and associates at Portland had they been able to do so.

Again we submit the correctness of the Court's rulings to the judgment of this tribunal, believing that no error will be found therein.

17. Alleged Error in Instructions Given and Refusal to Give Requested Instructions. (Assignments 40 to 50 Inclusive.)

Touching contentions of plaintiff in error under this heading, lettered (A), (B) and (C) nothing further need be said, as the points there raised are fully considered and supported by authorities, cited elsewhere in this brief.

Touching the contention denominated (D) respecting the testimony of the witness Nickell, we deem it sufficient to point to the ruling of this Court in the

case of M'Donough vs. United States, 299 Fed. 30-40 wherein it is held that in the proof of a nuisance charge, evidence of prior distinct sales of intoxicating liquor is admissible. In that view of the matter it would seem that the Court would not be required to place upon Nickell's testimony the limitation requested by the defendant. In any event, even under the defendant's own theory, we submit that the Court in his instructions sufficiently covered the point in question, for immediately following the instructions as to the materiality of the date alleged in the information, we find the following language:

> "But the offense here charged is an offense which was committed at the time that Gates and the two women went from here to Merrill's place, that is the offense charged and it must be proved. You will remember the circumstances: that the parties went out on the 10th and remained there until the 11th in the morning, and then returned home. Now ,that is the charge, and that is the one that must be proven in this case."

18. Alleged Error in Refusing to Instruct the Jury Upon the Defendant's Theory of his Defense. (Assignment 48).

In support of the claim of error under the above caption, counsel for the defendtnt contend that it was their theory that the defendant was entrapped into the commission of a crime and that the trial court erred in failing to present that aspect of the defense properly to the jury in his instructions. Because of that claim, it would seem important to examine the testimony of the defendant Merril, with a view to determining whether or not he was entitled to such instruction. On direct examination Merrill flatly and unequivocally denied that he had sold any liquor whatever to the officer or to his companions as charged in the information. Under cross-examination he reiterated this denial; albeit when pressed he did admit (page 127, Transcript of Record) that upon Mr. Gates asking him for Scotch, he had sold him a drink of "ginger ale" and charged him 50c therefor.

> "After he had bought a bottle of ginger ale and he came back he bothered me again there, insisted upon—wanted to know if I couldn't find one drink of Scotch, and Islid this bottle over to him to get rid of him. I didn't think he knew what he was drinking.

Q. (By Mr. Bynon) You thought he didn't even know what he was drinking?

A. I don't think he knew what Scotch would be anyway."

And again:

"Q. Now, when this party (Mr. Gates, Mrs. Johnson and Miss Meade) left on that occasion you say they had a package containing two pint bottles of liquor?

A. They had a package.

Q. It was wrapped up in newspaper?

A. Yes, sir.

Q. You say that Charlie, the porter, gave it to you and you handed it to the guests?

A. I handed this to them when they went to go away.

Q. Who did you hand it to?

A. I handed it to Mr. Gates. I said "this is something you left behind the chair." He never denied it.

Q. Did you see these people come in with the package when they came that night?

A. No sir. I didn't see them come in.

Q. You didn't see them come in.

Q. You didn't see them bring the package in?

A. I didn't see them come in at all. I was in the kitchen.

Q. You say there were two pint bottles in that package?

A. There was a package. I didn't know what there was because I was busy. I laid it right there.

Q. Didn't you testify on direct examination there were two pint bottles of liquor in that?

Q. That is the inference that I drew—the two shaped bottles— the package.' '

The above admissions by the defendant assuredly helped him none with the jury; yet, as bearing upon the question of entrapment, they certainly cannot be construed in the light of out and out admissions of guilt so as to entitle him to special instructions upon that point. We submit that under the evidence in this case, it was not at all encumbent upon the Court. to instruct on the question of entrapment.

"Where the evidence shows without con-

flict that the Government witness did no more than offer to buy liquor, thus affording the plaintiff in error an opportunity to violate the law, there is no entrapment."

Jordan vs. United States, 2 Fed. (2d) 598.

Murphy vs. United States, 2 Fed. (2d) 599.

Johnstone vs. United States, 1 Fed. (2) 928 (9th Circuit).

However, instructions upon entrapment were given, and we believe that they were both apt and ample.

"A conviction will not be set aside because of refusal to give instructions in the language requested by the accused's counsel, to the same effect as instructions given by the court."

Stubbs vs. .United States, 2 Fed. (2d) 468.

The trouble with the authorities relied upon by plaintiff in error to support the contention under consideration—as we read them—is what they do not fit the facts in the case at bar.

---

## CONCLUSION.

We could not hope, and, indeed, we have no wish to emulate the indubitably splendid rehetorical

flourish with which counsel polish off their argument; yet, perhaps a brief rejoinder thereto may be in order.

It is true ,as repeatedly stated by counsel and reiterated in their conclusion, that the defendant in this case is sixty years of age; but that offers no excuse for his offense in having conducted on the outskirts of Portland a notorious house of evil repute, where the law was mocked and trampled under foot, decency and modesty discarded, and young girlhood schooled in the ways of debauchery and sent on the road to destruction. The age of the defendant, we say, offers no excuse for such conduct, but rather adds to the gravity of his offense.

That the rights of this defendant during the course of the trial were not safeguarded by the Court is a statement, which in our opinion, reflects no credit upon his counsel. The case is just a rum house case, with nothing to distinguish it from other similar prosecutions, save the notorious character of the defendant and of the house which he conducted, and his ability to employ counsel schooled in the art of making much out of little. We submit that the alleged errors relied upon by the defendant

Merrill are without merit and that the judgment of the District Court should be affirmed.

Respectfully submitted,

GEORGE NEUNER,
United States Attorney.
J. O. STEARNS, Jr.,
Assistant United States Attorney.